

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

5 ASHLEY RIVER CONSULTING, LLC, CASE NO. 14-13406-mg

6 Debtors.

7 - - - - - x

8 In the Matter of:

9 EMERALD INVESTMENTS, LLC, CASE NO. 14-13407-mg

10 Debtors.

11 - - - - - x

12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, New York

15
16 October 14, 2015

17 10:08 AM

18
19 B E F O R E :

20 HON. MARTIN GLENN

21 U.S. BANKRUPTCY JUDGE

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23
24
25 ECRO: JP/KH

1 HEARING Re: (CC: Doc# 34, 38) Approval of Disclosure
2 Statement and Joint Plan of Liquidation

3

4 HEARING Re: (CC: Doc# 57, 61) Approval of Disclosure
5 Statement and Joint Plan of Liquidation

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25 Transcribed by: Sheila Orms

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. We're here in Ashley River Consulting
4 LLC, 14-13406 and Emerald Investments LLC, 14-13407. Can I
5 have the appearances, please?

6 MR. PITTA: Good morning, Your Honor, Thomas Pitta
7 at Emmet, Marvin & Martin on behalf of Kriti Ripley LLC and
8 Ashley River Properties II LLC. With me in court today is
9 David Williams, the managing partner of Kriti Ripley LLC.

10 THE COURT: Thank you.

11 MR. GAZES: Good morning, Your Honor, Ian Gazes,
12 I'm the Chapter 11 Trustee.

13 THE COURT: Thank you.

14 MR. WOLNERMAN: Good morning, Your Honor, David
15 Wolnerman, White & Wolnerman, PLLC on behalf of the Gayla
16 Longman (ph) Family Irrevocable Trust.

17 MS. PARK: Good morning, Your Honor, Karen Park,
18 Schultz Roth & Zabel for same.

19 THE COURT: Thank you.

20 MR. MORRISSEY: Good morning, Your Honor, Richard
21 Morrissey for the U.S. Trustee.

22 THE COURT: All right. Thank you, Mr. Morrissey.
23 Mr. Pitta.

24 MR. PITTA: Good morning, Your Honor. We're here
25 to enter a confirmation of the first amended joint plan of

1 liquidation, and that was proposed in this case by my
2 clients, Kriti Ripley and Ashley River Properties II, LLC
3 together with Ian Gazes as the Chapter 11 Trustee.

4 We filed the first amended plan on October 9th,
5 last Friday, Your Honor, together with a declaration of Mr.
6 Gazes in support of confirmation, a memorandum of law in
7 support of confirmation as well.

8 The memorandum of law relies on Mr. Gazes'
9 declaration, his prior report of the bidding results in this
10 case, as well as two prior declarations that were filed by
11 Mr. Williams in this case, one in support of our initial
12 motion to dismiss the case, as well as the declaration that
13 was filed in connection with the bid procedures motion, Your
14 Honor.

15 Yesterday we filed a draft of a proposed order
16 confirming the plan. Just one thing I did want to point out
17 is that the primary change in the first amendment plan from
18 the initial plan that had been filed was to strip out the
19 third party releases. In light of the bidding results, you
20 know, it was clear that they were not appropriate, and so we
21 decided to take them out voluntarily.

22 Your Honor, objections to the plan have been filed
23 by the Gayla Longman Family Trust, as well as by Schulte. I
24 would point out that the Schulte objection was filed at 3
25 o'clock yesterday afternoon.

1 THE COURT: It's untimely, but it just simply
2 joins in a portion of the objection filed by the Longman
3 Trust.

4 MR. PITTA: Understood, Your Honor.

5 Your Honor, it seems to me in looking at the
6 objections, that the primary issue that we have here is the
7 question has been raised regarding whether there's an
8 impaired accepting class under this plan. And Your Honor,
9 of course, may have other issues that you think you want to
10 address, but I think that's the one that stuck out to me in
11 looking at this as the primary obstacle to confirming this
12 plan.

13 THE COURT: That's certainly one of the objections
14 that the Longman Trust asserted. It also asserted that the
15 disclosure statement is inadequate because it failed to
16 address the issue of Emerald's voting rights potentially as
17 a result of a disassociation.

18 In your confirmation memorandum, you address the
19 issues raised regarding the disclosure statement,
20 specifically a discussion of the disassociation, and
21 indicate that it would proffer testimony by Mr. Gazes
22 without his consideration of the effect of his consideration
23 of the disassociation argument.

24 I don't take proffers in connection with a
25 contested confirmation hearing. So testimony would be

1 required and one of the things I want to -- this is one of -
2 - of course, the situation here is with respect to the
3 disclosure statement and disassociation is that your client,
4 Mr. Pitta, the consent is the only member of the consenting
5 class, it fully knows what the story is. There's no issue
6 about whether there's been adequate disclosure to your
7 clients on this issue of whether voting rights can somehow
8 be captured or not. And as to the unsecured class, they
9 voted against.

10 MR. PITTA: They did. And, Your Honor, they also
11 are receiving nothing under the plan and are deemed to
12 reject probably. But we solicited votes, because there was
13 a potential for a distribution.

14 THE COURT: So just --

15 MR. PITTA: So I think --

16 THE COURT: Just stop. The issue of the adequacy
17 of disclosure is not getting much traction from me because
18 all of you here fully understand the issue. It does seem to
19 me that I need to hear testimony regarding whether the
20 trustee's evaluation, whether there was merit in the
21 disassociation argument, and whether assuming it was valid,
22 it would have any impact whatsoever on the outcome in this
23 case.

24 Obviously the issue of whether Kriti is -- whether
25 it's class is an impaired class, you know, is both an issue

1 of fact and law. The only authority, the only real
2 authority that Longman Trust has cited in support of its
3 argument is Judge Glasser's decision in 183 Lorraine Street
4 Associates, which is at 198 B.R. 16, EDNY 1996, and you
5 certainly addressed in your memorandum why you think that
6 the case is distinguishable indeed in the context here,
7 where there was an effort to sell the property, unsuccessful
8 effort to sell the property for less than \$18 million strike
9 price, and Kriti's agreement early on essentially to fund
10 the administrative costs in the case.

11 Whether that creates the impairment, certainly
12 Judge Glasser in Lorraine Street Associates, in part,
13 addresses the issue, said well it couldn't decide at that
14 point whether under one of three scenarios, the creditor,
15 secured creditor would be impaired and cram down would be
16 possible. But it couldn't, since there hadn't been a sale -
17 - an effort to sell the property, he couldn't determine
18 whether that class was impaired or not.

19 And your argument is, we know that here.

20 MR. PITTA: Right. And he did say that in the
21 context that we have here, the creditor would be.

22 THE COURT: I'm mindful of that. I've got the
23 opinion right in front of me and I --

24 MR. PITTA: Yes. So --

25 THE COURT: -- read it over again this morning.

1 Let me ask a couple of questions of both sides.
2 First, Mr. Wolnerman, are you planning to put on any
3 witnesses in support of -- you didn't put in a declaration
4 at all. You filed an objection, but you didn't put in any
5 evidence at all. Are you planning to call any witnesses in
6 connection with the confirmation hearing?

7 MR. WOLNERMAN: It's not our intention, Your
8 Honor.

9 THE COURT: Okay. Do you intend to cross-examine
10 any of the plan proponents witnesses?

11 MR. WOLNERMAN: We do, Your Honor.

12 THE COURT: Okay. You know, these -- none of
13 these issues comes to a surprise to you or anybody else that
14 you raised many of these same issues at the time of the
15 bidding procedures motion and before that. So none of it's
16 -- it's not that you can argue that there's any surprise in
17 their arguments or issues they raised.

18 Are you prepared -- if Mr. Gazes testifies and the
19 -- bear with me a second. And Mr. Williams testifies, are
20 you prepared to cross-examine them today?

21 MR. WOLNERMAN: I prefer to do it on another day
22 but.

23 THE COURT: Well, you know, why -- did you seek to
24 take their depositions?

25 MR. WOLNERMAN: No, Your Honor.

1 THE COURT: Okay. Are you prepared to call them
2 today, Mr. Pitta?

3 MR. PITTA: If I need to do that, I will, Your
4 Honor.

5 THE COURT: Well, you know, in a contested
6 confirmation hearing where the objector -- objectors,
7 plural, have -- seems to me have raised both factual and
8 legal issues. As to the facts, I want to have an adequate
9 factual record on which to proceed. You can offer the
10 declarations of Mr. Gazes and Mr. Williams, but those
11 declarations don't cover all of the issues that are raised
12 by the objection. And indeed in your brief, you talked
13 about making a proffer. I don't accept proffers. So
14 somebody's got to get on the witness stand and raise their
15 hand and swear to tell the truth and be subject to cross-
16 examination.

17 MR. PITTA: Your Honor, I think that we would be
18 looking to rely on the declarations, but I would be happy to
19 put Mr. Gazes on the stand to testify to the issue of his
20 consideration of the disassociation option and his
21 determination to not pursue it.

22 I'm not sure that there's really other contested
23 issues of fact here. I think there's arguments about law,
24 but I think that the facts are fairly --

25 THE COURT: Let me do this. Mr. Wolnerman, what

1 do you believe are the contested issues of fact that the
2 Court has to resolve, in order to rule on the confirmation
3 of the plan?

4 MR. WOLNERMAN: Well, I think that there are a
5 number. One is whether or not the Class 1 is impaired. The
6 second would have to do with the disassociation notice, if
7 that is a viable option, and I guess the third and final is
8 whether in the value of up to or the debtor's 70 percent
9 interest in that entity.

10 THE COURT: And are you --

11 MR. WOLNERMAN: Your Honor, one of the things that
12 -- you know, we may call Mr. Longman.

13 THE COURT: Is he here?

14 MR. WOLNERMAN: He is not here. You know, I --

15 THE COURT: Well, this is the hearing, you know,
16 if you had a witness you were supposed to have them here and
17 ready to call them.

18 MR. WOLNERMAN: Only with respect to the sale,
19 Your Honor, because, you know, one of the statements that I
20 would like to make is that Mr. Longman would pay something
21 for his 70 percent interest, his non-voting interest,
22 whether that be a dollar, \$10, \$1,000 or something other,
23 and he's not here to back that up, but --

24 THE COURT: Go ahead.

25 MR. WOLNERMAN: -- that's my statement.

1 THE COURT: Well, why isn't he here? This was the
2 hearing -- the hearing was properly noticed. If you had
3 witnesses that you were intending to call -- you didn't put
4 in an affidavit.

5 MR. WOLNERMAN: And as I started, Your Honor, I
6 wasn't intending to call a witness.

7 THE COURT: Okay.

8 MR. WOLNERMAN: That's the only statement as to
9 value, but I don't believe that that's our burden.

10 MR. PITTA: Your Honor, the only response I would
11 have to that is this case is ten months old. At no point in
12 this case, has Mr. Longman been precluded from proposing a
13 plan, he had exclusivity, and then when a trustee was
14 appointed, exclusivity terminated. We're ten months in and
15 Mr. Longman has made zero efforts to propose a plan or
16 anything -- take any steps towards being prepared to do so.

17 THE COURT: I believe at the time of the bidding
18 procedures hearing, there was a colloquy in which I made
19 clear that if Mr. Longman by himself or with any affiliates
20 or investors wish to bid on Ashley River II, he could do
21 that. He hasn't.

22 Earlier in this case, in opposition to the motion
23 to dismiss, Mr. Longman put in an affidavit saying he
24 believed the property was worth \$30 million. On multiple
25 occasions, Mr. Wolnerman said that Longman would engage an

1 appraiser to appraise the property. It never happened. It
2 could have at any time.

3 I suppose the proponent's argument is that the
4 best test of the value of the property is what it would
5 bring at the market. There was bidding procedures approved
6 by the Court, and a process that was undertaken.

7 MR. PITTA: Your Honor, if the property is worth
8 \$30 million, our bidding procedures would have handed Stuart
9 Longman \$12 million.

10 THE COURT: Well, if it was worth \$30 million, I
11 assume someone would've come in and offered it, more than
12 the \$18 million strike price.

13 MR. PITTA: But vis a vis Mr. Longman, if he knows
14 that, he had his opportunity.

15 THE COURT: Indeed in one of my prior opinions,
16 because there have been two, one granting the motion to
17 appoint the Chapter 11 Trustee, one to approve the bidding
18 procedures, Ms. Park acknowledged on the record that unless
19 the property, Ashley River II sold for more than \$18 million
20 unsecured creditors, Schulte Roth being the largest of them
21 would recover nothing. That was acknowledged, that's how
22 the \$18 million strike price came about.

23 Unless the property sold for more than the 18
24 million, unsecured creditors would recover nothing.
25 Emerald's non-voting 30 -- 70 percent ownership interest

1 would recover nothing. And that was -- that's been clear
2 before today. And, you know, I do want to hear -- Mr.
3 Gazes' declaration does address the issue of the auction.
4 Mr. Wolnerman may have cross-examination he wants to do
5 further about it, but with respect to --

6 MR. PITTA: So with regard to --

7 THE COURT: Just stop a second. You know, Mr.
8 Wolnerman raises three issues, whether the claim -- Kriti's
9 claim is impaired, and that I think is both an issue of fact
10 and law. What I've been told is, I don't know what
11 administrative expenses have been incurred to date, Kriti
12 agreed to pay, fund the case essentially, but I don't know
13 what that means at this point.

14 Your brief, Mr. Pitta, argues that even if the --
15 I believe this is your argument, that even if the
16 disassociation notice were effective, Emerald at most would
17 have a 70 percent non-voting interest. It wouldn't
18 resurrect voting rights.

19 MR. PITTA: Correct. In addition, Your Honor, I
20 would also point out that whether Emerald's voting or non-
21 voting rights, whether their 70 percent interest has a
22 voting or non-voting interest does not change the fact that
23 it is a horribly underwater position that still has no
24 value.

25 THE COURT: Right. Because if the property

1 doesn't sell for more than \$18 million they would recover
2 nothing; isn't that true?

3 MR. PITTA: Right. So the voting --

4 THE COURT: Mr. Wolnerman is shaking his head no,
5 but I'll let him explain why that's so.

6 MR. WOLNERMAN: The voting interest doesn't change
7 the fact that it's way out of line.

8 THE COURT: And as to the value of ARC II and
9 Emerald, if the value of ARC II is less than \$18 million,
10 does Emerald have any value?

11 MR. WOLNERMAN: No. And I think that that issue
12 is addressed on a declaration of Mr. Williams in connection
13 with the bid procedures motion that goes --

14 THE COURT: He goes through the Allen sheets, he
15 builds the debt, shows what the accumulated -- what the debt
16 is and the capital arrangements. Let me hear -- before we
17 move forward, let me hear from -- Mr. Wolnerman, you
18 identified the three issues. Why does the disassociation
19 make a difference?

20 If Ashley River II is not worth more than \$18
21 million, why does the disassociation notice make any notice
22 whatsoever?

23 MR. WOLNERMAN: Your Honor, because I think that
24 that's kind of -- muddies the waters.

25 THE COURT: It doesn't muddy. Answer my question.

1 MR. WOLNERMAN: I'm trying to answer your
2 question, Your Honor.

3 THE COURT: Don't tell me it muddies the water,
4 tell me why you think it makes a difference.

5 MR. WOLNERMAN: Because there are two procedures,
6 Your Honor, one that was pursued here, which was to sell a
7 hundred percent in ARC II.

8 THE COURT: Which you couldn't do.

9 MR. WOLNERMAN: Which I could not do.

10 THE COURT: You didn't have the ability to do it,
11 Mr. Gazes didn't have the ability to do it. The only way
12 there was any ability to sell the property ARC II was with
13 the agreement of Kriti, agree?

14 MR. WOLNERMAN: Agreed.

15 THE COURT: Okay.

16 MR. WOLNERMAN: There was a second possibility
17 though, Your Honor. That instead of selling a hundred
18 percent of ARC II, 70 percent of ARC II would be sold.

19 THE COURT: 70 percent of nothing is nothing.

20 MR. WOLNERMAN: Well, that --

21 THE COURT: ARC II is worth \$8 million, 8 and a
22 half million dollars. Emerald's non-voting interest was
23 worthless.

24 MR. WOLNERMAN: No.

25 THE COURT: Why not?

1 MR. WOLNERMAN: Because if the property is worth
2 \$8 million, then under the association provision, assuming
3 that that's what the appraisal process would bring about, \$8
4 million would be put to ARC II and then to Kriti to purchase
5 this property at 70 percent of \$8 million, at \$5.6 million.
6 That -- the disassociation provision does not take into
7 consideration the amount of ARC II's debts or anything else.
8 It is a pure 70 percent of whatever the appraisers come out.
9 If it's 8 million --

10 THE COURT: Nonsense.

11 MR. WOLNERMAN: No, that's what --

12 THE COURT: ARC II has been found by arbitrators
13 to have -- you tried to recharacterize the debts because
14 Kriti and affiliates had made additional capital
15 contributions. You tried unsuccessfully to recharacterize
16 the amount of the debt, you failed.

17 MR. WOLNERMAN: Your Honor, I did not fail, that
18 issue was pushed off to confirmation --

19 THE COURT: No, no, no, no, I'm talking about in
20 the arbitration. Arbitrations plural. I mean, this issue
21 was addressed and decided against your client in one or both
22 of the arbitrations. I don't remember which one now.

23 MR. WOLNERMAN: Which issue are we talking about
24 because I'm not --

25 THE COURT: Well --

1 MR. WOLNERMAN: The issue of disassociation has
2 never been --

3 THE COURT: No, not the disassociation, but the
4 amount of the debt that Kriti is owed was at least as of the
5 date of the arbitration was decided. Do you agree?

6 MR. WOLNERMAN: There were certain debts that were
7 decided but that --

8 THE COURT: Certain debts were decided?

9 MR. WOLNERMAN: Your Honor, it is irrelevant. It
10 is irrelevant because the operating agreement under the
11 association provisions of the operating agreement, there is
12 not a mention of ARC II's debts. There's no set-off. In
13 fact, Your Honor, the operating agreement says that the
14 price shall be determined without set-off, and I can read
15 Your Honor the language.

16 THE COURT: I know what the language is, Mr.
17 Wolnerman.

18 MR. WOLNERMAN: Then I don't understand the
19 question, Your Honor.

20 THE COURT: Okay. Here, let's go. Call your
21 first witness, Mr. Pitta.

22 MR. WOLNERMAN: Your Honor, there are a couple of
23 points that I wanted to respond to --

24 THE COURT: Go ahead.

25 MR. WOLNERMAN: -- that were made as well.

1 There are a couple of things that we've gotten off
2 track about. One of them --

3 THE COURT: You're off track.

4 MR. WOLNERMAN: That may be.

5 THE COURT: Since the start of this case.

6 MR. WOLNERMAN: One of the issues that I --

7 THE COURT: Go call your client and have him come
8 down here. Where is he?

9 MR. WOLNERMAN: Your Honor, I can call my client.

10 THE COURT: Where is he?

11 MR. WOLNERMAN: I don't know. I don't -- I'm not
12 calling him as a witness, I'm not --

13 THE COURT: All right. What's your point? Let me
14 hear your points.

15 MR. WOLNERMAN: My point is that upon the
16 appointment of a trustee, this Court or the parties have
17 said that Mr. Longman is not the fiduciary here. He's not
18 the one who's going to run this case. So being told time
19 and time again Mr. Longman didn't get an appraisal, where is
20 the trustee's appraisal.

21 THE COURT: Well, you said you were going to get
22 an appraisal.

23 MR. WOLNERMAN: And you asked the trustee to get
24 an appraisal and that was not done.

25 THE COURT: Instead he marketed the property, the

1 whole property which couldn't have been done without the
2 agreement of Kriti.

3 MR. WOLNERMAN: At \$18 million. You don't know if
4 the property is worth \$17 million.

5 THE COURT: At \$17 million you'd get nothing.

6 MR. WOLNERMAN: No, Your Honor, I would not get
7 nothing.

8 THE COURT: All right. What's your next point?

9 MR. WOLNERMAN: I would get 70 percent --

10 THE COURT: Tell me what your next point is.

11 MR. WOLNERMAN: I would get 70 percent.

12 THE COURT: Tell me what your next point is.

13 MR. WOLNERMAN: There's been no finding regarding
14 ARC II's debt. There are certain issues. Some of the
15 issues that we had raised beforehand was whether or not the
16 capital contributions would go down, but that's beside the
17 point.

18 Your Honor, I think we made it very clear in our
19 papers and the arbitration awards are very clear, I
20 understand that's not the result that certain parties would
21 like, but what was lost in the arbitration were voting
22 rights, not voting membership interest.

23 THE COURT: There were specific findings regarding
24 the debt. The -- one of the remedies that was awarded in
25 the arbitration was stripping Emerald of voting rights, but

1 there were -- there's much more in that arbitration. What
2 else? We're going to get on with the evidence. Last point.

3 MR. WOLNERMAN: Okay. My last point, appraised
4 value shall mean the fair market value as --

5 THE COURT: Okay. I know what it says.

6 MR. WOLNERMAN: No, Your Honor, I'd like to read
7 that into the record.

8 THE COURT: I know exactly what it says.

9 MR. WOLNERMAN: Your Honor, I'd like to make my
10 point.

11 THE COURT: Sit down.

12 MR. WOLNERMAN: I note for the record that I'm be
13 shrugged down. This is --

14 THE COURT: I'm fully familiar with what the
15 language on appraisal in the event of disassociation says.
16 You don't need to read it to me and take the time.

17 Call your first witness, Mr. Pitta.

18 MR. PITTA: Your Honor, my --

19 THE COURT: Sit down.

20 MR. PITTA: Your Honor, we call Ian Gazes.

21 THE COURT: If you'd raise your right hand and be
22 sworn, Mr. Gazes.

23 IAN GAZES, WITNESS, SWORN

24 THE CLERK: Thank you.

25 THE COURT: All right. Go ahead, Mr. Pitta.

1 MR. PITTA: Just a second, Your Honor.

2 DIRECT EXAMINATION

3 BY MR. PITTA:

4 Q Good morning, Mr. Gazes.

5 A Good morning, Mr. Pitta.

6 Q You're the Chapter 11 Trustee for Emerald Investments
7 LLC and Ashley River LLC, correct?

8 A I am.

9 Q Mr. Gazes, upon your appointment as the Chapter 11
10 Trustee in this case, were you made aware that a
11 disassociation notice under the operating agreement
12 governing -- let me back up.

13 Are you aware that Emerald Investments LLC is a member
14 of Ashley River Properties II LLC?

15 A I am.

16 Q And are you aware that there's an operating agreement
17 governing the ownership and participation of the members in
18 Ashley River Properties II LLC?

19 A Yes, I am very well aware of it.

20 Q Upon your appointment as the Chapter 11 Trustee, were
21 you made aware that purportedly prior to the appointment of
22 a trustee, Emerald Investments LLC, at the direction of
23 Stuart Longman had served a disassociation notice under that
24 operating agreement upon the Kriti Ripley LLC?

25 A Yes. He did serve such a notice I believe just prior

1 to my appointment as trustee in the case. I did review the
2 notice and I also reviewed the operating agreement and the
3 arbitration award, at which time the voting rights were
4 stripped from Mr. Longman's ability to vote as a member of
5 the entity.

6 At that time, we researched what my ability was to
7 resurrect those voting rights, if there was such a
8 resurrection possibility, since there was a time constraint
9 and a lack of funds for payment of appraisal processes, in
10 addition to many appraisals having already been done, I
11 elected to withdraw the notice without prejudice, so that I
12 may spend some time in my office reviewing whether the
13 disassociation process would somehow, in some way, resurrect
14 the voting rights that were stripped from Emerald.

15 And we understood that research. We spent a good deal
16 of time looking at cases, look at the arbitration award,
17 looking at the historical data, which involved almost ten
18 years of litigation. And we determined that based upon the
19 operating agreement and the pre-existing history and the
20 awards, that the disassociation process would not resurrect
21 voting rights. It was law of the case, that Mr. Longman had
22 never served one before, or had ever asserted such a
23 position before, and that the best way to determine the
24 value of the property would be to ask the Kriti entity to
25 authorize me to sell a hundred percent of the property,

1 which would bring in exactly what the value would be.

2 Although the parties had agreed, and I also agreed,
3 having reviewed all the debt allocations, that we needed at
4 least \$18 million to cover the debt of the company. We
5 advertised the property as an asking \$18 million. And I
6 insisted upon the asking word, which would imply to any
7 potential bidder, that if they wanted to offer \$16 million,
8 that would not stop them from doing it.

9 It was never revealed to the public through my brokers,
10 Collier's International, that there was a reserve of \$18
11 million on the property. The Shulte firm had also requested
12 that we not put in a reserve. I agreed with them, hoping
13 that if the property value offer had come in at 15 million
14 or 14 million and there were two bidders, we might be able
15 to hold an auction, at which time we can raise those bids
16 through the auction process.

17 This property was well advertised, put out I think to
18 the world. We received only two offers which --

19 THE COURT: Why don't you -- stop. Let's ask
20 questions rather than -- okay.

21 Q Mr. Gazes --

22 MR. PITTA: May I approach the witness?

23 THE COURT: Yes, please, go ahead.

24 Q I'm going to hand you a document.

25 THE COURT: You need to do more than identify.

1 MR. PITTA: What I've handed the witness is the
2 objection filed by the Gayla Longman Irrevocable Trust.

3 Q Do you recognize the document, Mr. Gazes?

4 A I'm sorry?

5 Q Do you recognize the document?

6 A Yes, I do.

7 Q I have a couple of pages there. An exhibit to that
8 objection is the operating agreement of Ashley River
9 Properties II LLC; is that correct?

10 A That's correct.

11 Q Okay.

12 THE COURT: Mr. Wolnerman?

13 MR. WOLNERMAN: No objection, Your Honor.

14 THE COURT: No, do you have it, I just want to
15 make sure.

16 MR. WOLNERMAN: I brought my own copy.

17 THE COURT: Okay. That's fine.

18 MR. WOLNERMAN: I thought he was offering it as an
19 exhibit.

20 THE COURT: Are you offering the operating
21 agreement?

22 MR. PITTA: I'm not offering it.

23 THE COURT: Okay. Go ahead, ask your questions.

24 BY MR. PITTA:

25 Q Mr. Gazes, on page 3 of the operating agreement, can

1 you read the definition of membership chair?

2 A In subparagraph small little R, "membership share shall
3 mean all rights of a member under this agreement and under
4 the Act, including but not limited to, a member's financial
5 rights and voting rights."

6 Q Okay. And, Mr. Gazes, can you read down at letter Z,
7 definition of voting rights?

8 A "Voting rights shall mean the right of a member to vote
9 on any manner as provided in this agreement or under the
10 Act. Each member's votes shall be a percentage, expressed
11 as a fraction, the numerator of which in such member's
12 membership shares, and the denominator of which is the total
13 voting membership shares owned by the members."

14 Q Mr. Gazes, are you aware of the status of Emerald
15 Investments LLC's voting rights under this agreement?

16 A There are no voting rights under this agreement for
17 Emerald based upon the arbitrator's award.

18 Q Okay. If you could turn to page 33, which I've tabbed
19 there as well. And actually one more page to 32, see
20 Section 11.3, the right to buy upon disassociation.

21 THE COURT: I'm sorry, you trailed off.

22 MR. PITTA: I'm sorry, I'm losing my voice, Your
23 Honor.

24 THE COURT: Okay.

25 Q On page 32, there's a section, 11.3, the right to buy

1 upon disassociation, right?

2 A That's correct.

3 Q And you reviewed these provisions in connection with
4 your analysis of whether to proceed with the disassociation
5 option?

6 A Absolutely.

7 Q Okay.

8 A Many times.

9 Q And if you'd turn to page 33, there's a section on the
10 purchase price under disassociation; is that correct?

11 A That's correct.

12 Q And do you understand what the purpose of the
13 establishment of the purchase price in this agreement is?

14 A I do.

15 Q And what is that?

16 A Well, the purchase price would have been the result of
17 several appraisals, the average of which would have resulted
18 in what the value would be attributable to the association,
19 the party who was selling the interest.

20 Q Okay. And under subsection B, there's a second
21 paragraph there that begins, "the purchase price shall be
22 the appraised value as designed herein, of the membership
23 share," correct?

24 A That's correct.

25 Q Is that membership share an ownership interest in

1 Ashley River Properties II LLC?

2 A It is.

3 Q Is it an ownership share directly in the marina
4 property that is owned by Ashley River Properties II LLC?

5 A I'm not sure I understand the question.

6 THE COURT: Rephrase that.

7 Q Ashley River Properties II LLC is the owner of the
8 marina property that we had offered for sale.

9 A That's correct.

10 Q Do the members of Ashley River Properties II directly
11 own the marina property, or do they --

12 A No, they --

13 Q They own through Ashley River Properties II LLC?

14 A They do not. They own an interest in the entity.

15 Q So is it your understanding that following an appraisal
16 process, the purchase price that would be offered to the
17 other members of the LLC, or the LLC in the first instance,
18 would be the appraised value of the shares in Emerald -- I'm
19 sorry, in Ashley River Properties II?

20 A That's correct.

21 Q And is it your understanding that the value of these
22 shares, the equity in Ashley River Properties II LLC is
23 encumbered by being junior to the debts of Ashley River
24 Properties II LLC?

25 A Of course.

1 Q So if an appraiser had valued the underlying marina
2 property at \$8 million, and I will stipulate that 70 percent
3 of \$8 million is \$5.6 million, would Emerald be entitled to
4 receive \$5.6 million?

5 A No.

6 THE COURT: Why not?

7 THE WITNESS: Because the debt of the Ashley River
8 II exceeded the \$8 million appraisal. Therefore, the
9 membership interest would have a zero value.

10 BY MR. PITTA:

11 Q The disassociation provisions -- are you aware of
12 anything in the operating agreement that would reinstate the
13 voting rights of Emerald Investments LLC upon the effect of
14 a disassociation?

15 A I haven't found any semblance of any evidence that that
16 would happen.

17 Q And the operating agreement provides certain rights of
18 parties to acquire the membership share. If none of those
19 parties acquire the membership share, what happens to it?

20 A I don't recall, I'd have to go back to the agreement.

21 Q You're on page 33 of the operating agreement, correct?

22 A That's correct.

23 Q There's a paragraph above subsection B that begins "if
24 none of the associating members --" and I'll read it. "If
25 none of the associating members accept the offer to purchase

1 the disassociating membership share within 30 days after
2 receipt of written notice by them, then the disassociating
3 membership share should be transferred to the guardian
4 conservator or legal successors of the disassociating
5 member.

6 "Upon such transfer, the company and non-associating
7 members shall admit the transferee as a member of the
8 company."

9 A That's correct.

10 Q So if none of the parties acquire the membership share
11 of Emerald, does that refresh your recollection as to whom
12 it would go to?

13 A Yes, it does.

14 Q And who would that be?

15 A It would be a third party who would become a member.

16 Q The disassociating member in this case, do you recall
17 who that was? Who sent the disassociation notice?

18 A Emerald did.

19 Q So this paragraph says, that the disassociating
20 membership shall be transferred to the legal successor of
21 the disassociating member.

22 A That's correct.

23 Q Are you the legal successor of Emerald, as the trustee?

24 A Well, I would -- I could be deemed that, yes.

25 Q If I were to stipulate, for purposes of argument, that

1 the voting rights of Emerald would be reinstated by virtue
2 of disassociation, does that change your opinion as to
3 whether disassociation serves a purpose for this estate?

4 A It would not change my opinion at all.

5 Q Do you believe that a voting interest in Ashley River
6 Properties II LLC, a 70 percent voting interest in Ashley
7 River Properties II LLC has any value to the estate?

8 A It has no value to my knowledge.

9 THE COURT: Why is that?

10 THE WITNESS: Because you would have a third party
11 wishing to become a member and be saddled with a 14 to \$18
12 million debt load, considerable capital contribution which
13 has not been made by Emerald. I can't imagine that anybody
14 would want that kind of a situation going into a partnership
15 with an unknown party, having no value, with the company
16 being considerably under water, and subject to immense
17 capital contribution loss.

18 THE COURT: Go ahead, Mr. Pitta.

19 MR. PITTA: Nothing further, Your Honor.

20 THE COURT: Cross-examination.

21 MR. WOLNERMAN: Thank you, Your Honor.

22 THE COURT: Let me just, before you start, what
23 we're going to do is I have a very short matter at 11
24 o'clock, it's 10:48. Start your cross-examination now, I'll
25 call the other matter, it'll only take a few minutes, but I

1 just want you to know about it now, okay?

2 MR. WOLNERMAN: I appreciate that.

3 CROSS-EXAMINATION

4 BY MR. WOLNERMAN:

5 Q Mr. Gazes, I believe you were just asked what happens -
6 - what would happen in the event of disassociation if the
7 members in the company didn't purchase it, didn't purchase
8 the Emerald's interest in ARC II, what would happen? I
9 believe you testified that you didn't know; is that correct?

10 A No, I didn't testify I didn't know.

11 Q So can you just explain what it is that you testified?

12 A Can you -- is it possible to --

13 THE COURT: No, it isn't possible to read it back.

14 THE WITNESS: I believe my answer was, I don't
15 recall, I'd have to look at the agreement.

16 Q If I can draw your attention to the same document you
17 were looking at, the operating agreement, 11.3(c), that's on
18 page 34. Are you there?

19 A I am.

20 Q Do you see the last -- the first paragraph, the last
21 sentence, "If any party fails to appoint"? Can you read
22 that to me?

23 A You're in subparagraph B entitled purchase price
24 (disassociation)?

25 Q Purchase price (disassociation), correct, on the

1 carryover on page 34 right before subsection C.

2 A Okay. And what's the question?

3 Q Can you read that section to me, that sentence, "If any
4 party fails to appoint" from there?

5 A "If any party fails to appoint an appraiser within the
6 time required herein, the purchase price determined by the
7 appraiser appointed by the other party shall be conclusive
8 and binding upon the seller and purchaser(s), their personal
9 representatives, legal representatives, heirs, successors,
10 and assigns."

11 Q And I'm sorry, I had you look at the wrong section, my
12 fault. If you could turn to 11.3(a) on 33, the last
13 paragraph before subsection B, "If none --"

14 THE COURT: Just bear with me a second, okay?

15 MR. WOLNERMAN: Sure.

16 THE COURT: Just tell me where again you're
17 looking?

18 MR. WOLNERMAN: I'm on page 33, it's the carryover
19 from Section 11.3(a).

20 THE COURT: Yes, go ahead.

21 BY MR. WOLNERMAN:

22 Q Do you see the paragraph that begins, "If the non-
23 disassociating members accept"?

24 A Yes. I'm on page 33, right above is subparagraph 3.

25 "If none of the disassociating members accept the offer to

1 purchase the disassociating membership share within 30 days
2 after receipt of written notice by them, then the
3 disassociating membership share shall be transferred to the
4 guardian, conservator, or legal successors of the
5 disassociating member. Upon such --"

6 Q That's fine, thank you.

7 Mr. Gazes, are you the legal successor? Would you be
8 the legal successor of the debtor if it were the
9 disassociating member?

10 A Who is the disassociating member?

11 Q Assuming that its Emerald, the Debtor Emerald.

12 A I believe I would be.

13 Q But you don't have the definitive answer?

14 THE COURT: He just said he believed he would be,
15 go ahead, ask your next question.

16 Q Is it your belief that in the event of the
17 disassociation of Emerald in which neither of the non-
18 associating members accepted the offer, that you would then
19 be the legal representative and holding Emerald's shares?

20 MR. PITTA: Asked and answered.

21 THE COURT: Sustained.

22 Q Mr. Gazes, did you ever get an appraisal for this
23 property?

24 A I received several appraisals.

25 Q Did you, yourself, order an appraisal for this

1 property, an independent appraisal on behalf of this estate?

2 A I did not order an appraisal for the property.

3 Q Thank you.

4 Mr. Gazes, are you familiar with the idea with the
5 concept of financial interest, a financial right as that
6 term is defined under the operating agreement?

7 THE COURT: I'm sorry, I lost the train. Ask it
8 again.

9 Q The question that I asked is, Mr. Gazes, are you
10 familiar, are you aware of what the concept, what the
11 definition of a financial right is, as defined in the
12 operating agreement?

13 A I'm afraid I don't understand what you mean by the
14 concept of financial interest.

15 Q What does financial right mean under the operating
16 agreement?

17 A In what context?

18 Q In a definition context as Section 1.1.0, how is that
19 defined in the operating agreement?

20 A There is no definition here for financial interest.

21 Q Financial rights.

22 A It's defined in the agreement.

23 Q And is it members' rights to receive a distribution.

24 A It defines what their distribution would be.

25 Q Financial rights defines what the distribution to be,

1 or does it define what --

2 A It says, the right of each member to share in the
3 profits and losses of the company, and the right to share in
4 distributions. I'm paraphrasing.

5 Q Is there a distinction between a voting right and a
6 voting membership share under the operating agreement?

7 A They both have different definitions.

8 Q Is that a yes?

9 A They're defined in the agreement.

10 Q Mr. Gazes, what is a voting right?

11 A A voting right is defined in the agreement in
12 subparagraph C, which I believe I read into the record
13 already.

14 Q And how does that, in your opinion, how does that
15 differ from a voting membership share?

16 A I don't know that there is a difference.

17 Q So you're saying that those are two of the same things?

18 A I've answered the question.

19 THE COURT: Answer it again.

20 THE WITNESS: What's the question?

21 Q The answer -- the question is, in your opinion, what is
22 the distinction between voting rights and voting membership
23 interests?

24 A The voting rights are subsumed into what the voting
25 membership interest is.

1 Q Now, you've testified before that in the prepetition
2 arbitrations, the Debtor, Emerald, had lost its voting
3 rights.

4 A That's correct, that's correct.

5 Q Are you aware of any reference in arbitration or
6 elsewhere that references a loss of the debtor's membership
7 -- voting membership interest?

8 A I don't recall whether there was specific language to
9 that effect.

10 Q But wouldn't that directly bear on whether or not the
11 estate can recapture its voting rights, something that you
12 said you researched multiple times, and that you were clear
13 at the end, that that couldn't possibly retake the voting
14 rights?

15 MR. PITTA: I think it calls for a conclusion.

16 THE COURT: Sustained.

17 Q Mr. Gazes, is it your recollection that in prepetition
18 arbitration, that the arbitrator specifically says that
19 Emerald shall not lose its membership interest?

20 A I believe it did say that. I don't remember the exact
21 wording.

22 Q And the definition of membership interest is what?
23 Membership share, I'm sorry.

24 A The definition of voting membership share shall mean
25 each member's voting membership shares listed on Exhibit A

1 attached hereto.

2 Q Membership share.

3 THE COURT: Is that a question?

4 MR. WOLNERMAN: I may have been looking at the
5 different definitions, I'm looking at membership share R,
6 page 3.

7 THE WITNESS: I'm sorry, I don't understand.

8 Q How is membership share defined?

9 A Voting membership shares, is that what you're asking
10 me?

11 Q No, just membership share.

12 THE COURT: Page 3, small R.

13 THE WITNESS: Oh, I'm sorry, I didn't see that.

14 Membership share shall mean all the rights of a member under
15 this agreement and under the Act, including but not limited
16 to a member's financial rights and voting rights.

17 BY MR. WOLNERMAN:

18 Q And those membership shares were not lost, they were
19 specifically preserved as part of the arbitration. What was
20 lost were the voting rights.

21 A The membership interest was not lost. The voting
22 rights for that membership interest was taken away from Mr.
23 Longman.

24 Q And, if you can --

25 A What is the Longman Trust.

1 Q Do you know if the voting membership shares were
2 forfeited or lost in any place?

3 A Could you repeat that? I don't think I understand.

4 MR. PITTA: It'd be helpful if he'd put a document
5 in front of him, Your Honor.

6 MR. WOLNERMAN: He has a document in front of him.

7 MR. PITTA: I mean the arbitration award, Your
8 Honor.

9 THE COURT: Do you want to see the arbitration
10 awards?

11 THE WITNESS: I would, Your Honor, since he's
12 referencing.

13 MR. WOLNERMAN: I don't have additional copies.

14 THE COURT: Let's stop. Stop. We're going to
15 take a brief recess while I call the next matter. Mr.
16 Gazes, you can step down. Mr. Wolnerman, maybe you can
17 point -- somebody find him the arbitration award, point to
18 him what you wanted to ask about, so when he comes back on
19 the witness stand, he'll have it in front of me, okay?

20 THE WITNESS: Thank you, Your Honor.

21 MR. WOLNERMAN: I'm going to reserve my questions
22 for when he gets back on the stand.

23 THE COURT: Yeah, okay. Go ahead.

24 THE WITNESS: Thank you.

25 (Recessed at 10:59 a.m.; reconvened at 11:22 p.m.)

1 THE COURT: Okay. I'm recalling Emerald
2 Investments and Ashley River Consulting.

3 Mr. Gaze, why don't you --

4 THE WITNESS: I understand that I'm still under
5 oath.

6 THE COURT: You're still under oath, correct. Let
7 me just -- okay. Go ahead, Mr. Wolnerman.

8 MR. WOLNERMAN: Thank you, Your Honor.

9 THE COURT: Cross-examination resumes. Go ahead.

10 MR. WOLNERMAN: Yes, I only have a few more
11 questions.

12 BY MR. WOLNERMAN:

13 Q Mr. Gaze, I think where we left off, I was asking or
14 wanted to ask, is it your understanding that in the course
15 of the prepetition arbitrations, that Emerald was found to
16 continue to own 70 percent of its membership share?

17 A That's my recollection, yes.

18 Q And, Mr. Gaze, am I correct in asserting that shortly
19 after your appointment, you had met, on more than one
20 occasion, with Mr. Longman?

21 A That's correct.

22 Q Did Mr. Longman ever offer to pay for the appraisal on
23 behalf of the estate?

24 A He did offer. Never produced the funds.

25 Q Was there an agreement being worked out amongst --

1 between the trustee and --

2 A There was an agreement that --

3 THE COURT: No, let me hear the rest of the
4 question.

5 MR. WOLNERMAN: Yes.

6 Q Was there an agreement being worked out between the
7 trustee, Longman, maybe even other parties that had one of
8 the terms had to do with the appraisal?

9 A My first call was to work out an agreement with all the
10 parties, and I initially approached Mr. Longman with regard
11 to that agreement, and spent weeks discussing the agreement,
12 and I sent the form agreement over to your office and never
13 heard back from you --

14 Q No, that wasn't my question.

15 A -- until about four or six weeks later.

16 Q Mr. Gaze, my question was, was the proposed appraisal
17 that Mr. Longman said he would pay on behalf of the estate,
18 was that a term -- was not part of one of those agreements.

19 A Yes, it was.

20 Q And were any of those agreements ever finalized?

21 A No.

22 Q Thank you.

23 Going back to the disassociation provisions, in the
24 event of a disassociation, an appraisal of the company, of
25 ARC II, is it your understanding that any discounts get

1 applied?

2 A What kind of discounts?

3 Q Any kind of discount.

4 THE COURT: I don't understand the question.

5 MR. WOLNERMAN: Okay. So maybe we can step back.

6 Q Is it your understanding that the disassociation
7 procedure, process under the operating agreement at the
8 beginning is some sort of appraisal process?

9 A That's correct.

10 Q And there are appraisers, more than one possibly that
11 are to be retained, and then an appraisal produced.

12 A I believe it calls for three appraisals if the parties
13 don't agree.

14 Q And that appraisal ultimately, there will be an average
15 I think that's what you testified before.

16 A I don't remember the formula, but there was some
17 formula as concerns what the ultimate price would be based
18 on the three appraisals. So although the third appraisal
19 may be the final one, and that might have been the binding
20 one, I don't recall.

21 Q In reaching this appraisal, is it your understanding
22 that the appraisers would use something called fair market
23 value as defined under the operating agreement?

24 A Whatever the agreement provided for, that's the kind of
25 appraisal that would've been required.

1 Q Okay. So let me draw your attention back to page 33,
2 section 3, purchase price.

3 A Yes.

4 Q Can you read to me the second sentence of the second
5 paragraph in Subsection B, beginning with "appraised value
6 shall mean"?

7 A "Appraised value shall mean the fair market value as
8 defined below of the membership share obtained by agreement
9 of two appraisers, one appointed by the seller, and one
10 appointed by 51 percent of the remaining members on behalf
11 of the company."

12 Q Now, in reaching that fair market value appraisal, is
13 it your understanding that the appraiser is authorized under
14 this agreement, to deduct any amount for lack of
15 marketability, minority interest, lack of voting, debt?

16 A You're asking me two different things. The appraisal
17 has to do with the value of the company, not of the 70
18 percent interest.

19 Q I understand that. So when the appraiser puts together
20 an appraisal of the hundred percent of ARC II, is it your
21 understanding that the appraiser is allowed to then deduct
22 the amount of ARC II's debts from the appraised value?

23 A Again, I think you're mixing apples with oranges. The
24 appraiser is only to give value, the appraiser doesn't then
25 value the value of the membership interest. The agreement

1 is what guides on the membership interest value.

2 Q Again, I'd offer you to answer my question. My
3 question was, in reaching that appraised value, does the
4 appraiser have any authorization to reduce, whatever value
5 they reach, based on ARC II's debt?

6 MR. PITTA: Your Honor, it's a 40-something paged
7 document, is there a provision in here that he wants to
8 point him to?

9 THE COURT: If he can answer it, he'll answer it.
10 The objection is overruled. Are you able to answer the
11 question, Mr. Gazes?

12 THE WITNESS: No, I'm not, Your Honor, I'm sorry.

13 THE COURT: Ask your next question.

14 BY MR. WOLNERMAN:

15 Q And you're not sure after studying and researching it?

16 THE COURT: Ask your next question, objection is
17 sustained, ask another question.

18 Q If I can draw your attention to page 33, Subsection B,
19 the second paragraph, the sentence right after the one you
20 read. Isn't it true that that provides that in reaching the
21 fair market value, that no discounts from an RA interest,
22 lack of marketability or other similar discounts, included
23 but not limited to those related to undivided interest in
24 real estate, voting versus non-voting interest, blockage,
25 key person or portfolios shall be taken into account?

1 A That's what it says.

2 Q So my question to you, is in reaching your conclusion,
3 I think this is what -- you correct me if I'm wrong, I
4 believe what you had testified before was that in the event
5 of a disassociation, that even assuming that the estate got
6 the voting rights back, that the value, Emerald's value, the
7 value of 70 percent interest in ARC II would still be
8 worthless, because you would have to deduct the amount of
9 ARC II's debt; is that correct?

10 A I don't -- you're paraphrasing what my answer was. I
11 don't recall using that language, so I can't answer that
12 question.

13 MR. WOLNERMAN: Your Honor, I'm going to ask the
14 question again then.

15 THE COURT: No, you're not. Ask another question.

16 MR. WOLNERMAN: I will. I'm going to ask the
17 question that Mr. Pitta asked.

18 Q Is assuming that there was a disassociation event, and
19 assuming that the result of that disassociation event, was
20 that Emerald was to recapture its voting rights, is it your
21 opinion that Emerald's 70 percent interest in ARC II would
22 have value?

23 A It's my opinion that it would not have value.

24 Q You value it at zero?

25 A Or negative.

1 Q And you got to that conclusion by deducting the amount
2 of ARC II's debt; isn't that correct?

3 THE COURT: Your position is that he's supposed to
4 pay \$5.6 million dollars when the interest, the membership
5 interest is worthless. That's the most ridiculous I've
6 heard. Ask another question.

7 MR. WOLNERMAN: Your Honor, I take exception to
8 that.

9 THE COURT: Well, take all the exception you want.
10 Ask another question.

11 MR. WOLNERMAN: That's exactly what the operating
12 agreement calls for.

13 THE COURT: Ask another question, ask a question.

14 MR. WOLNERMAN: I asked my question, I'd like my
15 answer.

16 THE COURT: Overrule -- the objection is
17 sustained. Ask another question.

18 MR. WOLNERMAN: I have no further questions, Your
19 Honor.

20 THE COURT: Ms. Park, do you wish to cross-
21 examine?

22 MS. PARK: No, thank you.

23 THE COURT: Okay. Redirect.

24 MR. PITTA: I'll be brief, Your Honor.

25 THE COURT: I do want to hear about the

1 administrative expenses.

2 MR. PITTA: I'll get to that.

3 THE COURT: Okay.

4 REDIRECT EXAMINATION

5 BY MR. PITTA:

6 Q Mr. Gazes, Mr. Wolnerman just read a sentence to you
7 from Section 11.3.B in that second paragraph that said, "No
8 discounts for minority interests, lack of marketability, or
9 other similar type discounts shall be taken," correct?

10 A That's correct.

11 Q Would you consider the amount of debt that comes before
12 the equity in a company to be a similar discount to whether
13 the equity in their company is marketable or has voting
14 rights?

15 A No, I would not.

16 Q Is it your understanding that the capital structure of
17 the company, the equity comes behind the debt.

18 A That's correct.

19 Q And that has nothing to do with whether the shares are
20 marketable or has voting rights?

21 A That's correct.

22 MR. WOLNERMAN: Objection.

23 THE COURT: Overruled.

24 Q Mr. Gazes, you're the proponent or co-proponent of the
25 first amended joint plan of liquidation, correct?

1 A I am.

2 Q You're generally familiar with the terms of the plan.

3 A I am.

4 Q What does the plan provide with respect to payment of
5 administrative claims?

6 A Kriti has agreed to fund the Chapter 11 administration
7 expenses a hundred percent.

8 Q So whatever allotted administrative expenses there are,
9 Kriti has agreed to pay upon confirmation of the plan.

10 A That's correct.

11 Q Do you have any sense, as of today, what the amount of
12 the administrative claims that you expect there to be?

13 A I believe that the administration expenses for
14 professionals to date are around \$80,000, and plus a United
15 States Trustee quarterly fees, which are about, I believe,
16 around 3 to \$3,500.

17 Q So the -- you expect the total administrative expenses
18 to be in excess of \$90,000?

19 A I do. Subject to Court approval of costs.

20 Q You're aware of a case called 183 Lorraine Street
21 Associates has been referenced in this matter as a --

22 THE COURT: We're not going to get into issues of
23 law with testimony.

24 MR. PITTA: I just want to get to a fact issue.

25 Q Are you familiar with the facts of that case generally?

1 A Difficult to follow but I'm familiar.

2 Q Do you recall that in that case, the secured creditor
3 had agreed to contribute \$5,000 to a junior class of --

4 A To the general unsecureds, yes.

5 Q In your opinion, do you think that the contribution
6 that's been promised by Kriti in this case is significantly
7 greater than that, and leads to a real impairment of their
8 claim?

9 A I believe so.

10 MR. PITTA: That's all I have.

11 THE COURT: Let me ask, Mr. Pitta, are you
12 offering Mr. Gazes' declaration which is dated October 9th,
13 2015, it's Declaration of Ian Gazes, Chapter 11 Trustee for
14 Emerald Investments, LLC and Ashley River Consulting LLC in
15 support of confirmation, the first amended joint plan of
16 liquidation?

17 MR. PITTA: I am, Your Honor.

18 THE COURT: Any objection?

19 MR. WOLNERMAN: No objection.

20 THE COURT: All right. The declaration is
21 admitted into evidence.

22 Mr. Gazes, when did you withdraw the notice of
23 disassociation?

24 THE WITNESS: I remember that there was a time
25 limitation on which the disassociation notice took effect,

1 so I did it, I believe within a week or two weeks of my
2 appointment.

3 THE COURT: Okay.

4 THE WITNESS: But I did it without prejudice.

5 THE COURT: Any further questions?

6 MS. PARK: Your Honor, can I ask -- I'd like to
7 ask one question based on the questions asked --

8 THE COURT: Go ahead, Ms. Park.

9 CROSS-EXAMINATION

10 BY MS. PARK:

11 Q Good morning, Ms. Gazes.

12 A Good morning.

13 Q Just one question with respect to the question related
14 to the admin expenses contributed by his client. Is it your
15 view that the admin expenses put in by Kriti, the funding of
16 those expenses, is that a part of its secured claim?

17 MR. PITTA: That calls for a conclusion, Your
18 Honor.

19 MS. PARK: Well, the question that was asked that
20 I heard, was that it meant to lead his conclusion that led
21 to impairment of the secured claim, so it's a follow-on of
22 that question.

23 THE COURT: Do you have the question in mind?

24 THE WITNESS: I'm sorry, Your Honor?

25 THE COURT: Ask your question again, Ms. Park.

1 BY MS. PARK:

2 Q Is it your view that the admin expenses and the funding
3 of that contributed by Kriti forms a portion of its secured
4 claim?

5 MR. PITTA: Objection to form then, Your Honor.

6 THE COURT: Overruled. If you have a view on it.

7 THE WITNESS: I've never really thought about it.

8 I don't believe so.

9 MS. PARK: Thank you.

10 THE COURT: Okay.

11 MR. WOLNERMAN: Can I ask something?

12 THE COURT: Go ahead, Mr. Wolnerman.

13 RECROSS-EXAMINATION

14 BY MR. WOLNERMAN:

15 Q Mr. Gazes, what value does Kriti's contribution of
16 admin claims, payment of admin claims, what is attributed to
17 this estate? There are agreements to pay your fees going
18 forward, what benefit does it not have to creditors or the
19 estate?

20 A Well, administration expenses are creditors in the
21 case, so for me, it has significant value.

22 Q So general unsecured creditors, does that have any
23 value?

24 A No, it does not.

25 Q Did this process provide any value to general unsecured

1 creditors?

2 A No, did not. It could have, but it did not.

3 Q If Kriti did not agree to fund your administrative
4 expenses, how would you have maximized the value on behalf
5 of this estate?

6 A I probably would have had a 363 or requested for a 363
7 sale of the property.

8 Q On which property?

9 A Of the debtor's interest, 70 percent.

10 Q Even though you believe that has no value.

11 A That's correct. That would have demonstrated the no
12 value if that's the way it turned out. So I would have had
13 the ability to close the case.

14 THE COURT: Mr. Pitta?

15 MR. PITTA: Nothing further for this witness, Your
16 Honor.

17 THE COURT: All right. You can step down, Mr.
18 Gazes.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: Call your other witness, Mr. Pitta.

21 MR. PITTA: Your Honor, I believe at this point,
22 we'll be relying on the declarations.

23 THE COURT: Do you want to offer -- you haven't
24 offered the declarations.

25 MR. PITTA: So I would like to offer the

1 declaration of David Williams in support of both the motion
2 for an order dismissing debtor's cases, or in the
3 alternative granting relief from the automatic stay, which
4 is Docket No. 23 in this case.

5 And the declaration of David Williams in support
6 of the motion for an order approving marketing, bidding and
7 sale procedures in connection with a joint plan of
8 liquidation under Docket No. 61, both of course, references
9 to the Emerald docket, Your Honor.

10 THE COURT: Any objection?

11 MR. WOLNERMAN: No objection, Your Honor.

12 THE COURT: All right. The two declarations of
13 David Williams, ECF Dockets No. 23 and 61 will be admitted
14 into evidence.

15 MR. PITTA: And finally, Your Honor, one pick-up
16 as well, is that we would offer for evidence the trustee's -
17 - Chapter 11 trustee's report of bidding and sale for the
18 marina property, the trustee's auction report which was
19 filed at Docket No. 91 in this case.

20 THE COURT: Any objection?

21 MR. WOLNERMAN: No objection.

22 THE COURT: All right. Trustee's report ECF
23 Docket No. 91 is in evidence. Do you rest, Mr. Pitta?

24 MR. PITTA: Yes, Your Honor.

25 THE COURT: All right. Mr. Wolnerman, do you wish

1 to present any evidence?

2 MR. WOLNERMAN: No, Your Honor.

3 THE COURT: All right. Let's hear closing
4 argument. Mr. Pitta.

5 MR. PITTA: Your Honor, as I went through earlier,
6 we believe that the facts of this case fall squarely within
7 the portion of 183 Lorraine Street where the judge there
8 found that a secured creditor who receives his collateral
9 under the plan, but who agrees to pay junior creditors is
10 impaired and not is receiving the full value of its
11 collateral.

12 We therefore believe based on that, that there is
13 an impaired class that accepted this plan, which is Class I,
14 the Kriti claim class. Kriti has a judgment for \$1.7
15 million and all the evidence in this case suggests that on
16 account of that it's getting zero dollars and contributing
17 cash to the case, so we do think there is an impaired
18 accepting class.

19 Your Honor, shortly after the case was filed, we
20 sought a dismissal of the case. And Your Honor declined
21 that and appointed a trustee and said it stay in Chapter 11.
22 And let's try and get to a resolution in Chapter 11 with a
23 trustee, an impartial third party who you thought would be
24 able to negotiate with the parties, because the parties, as
25 they existed, one of your findings of your trustee opinion

1 was that the parties couldn't work together.

2 So upon the trustee's appointment, we went to work
3 on trying to reach a deal with the trustee. immediately
4 after his appointment, we provided extensive background
5 information to him, financials of Ashley River Properties to
6 both with respect to the assets, i.e., the historical bids
7 or bidding information for the marketing processes that had
8 happened in the past, various appraisals that had been done
9 on the property, as well as all the debt documentation.

10 All the debt documentation that was submitted in
11 connection with Mr. Williams' declaration on the bid
12 procedures was provided --

13 THE COURT: That are exhibits to his --

14 MR. PITTA: They're exhibits to his declaration.
15 All that information was provided to the trustee. As soon
16 as it could be compiled after his appointment.

17 We spent a fair amount of time with the trustee
18 and his counsel going over that information, getting them to
19 understand how the debt bridged from the 2010 arbitration
20 award to where it is today. We don't think that there is
21 any legitimate question as to those debts. Nobody has ever
22 sought to cross-examine Mr. Williams or provide any evidence
23 to the contrary for the fact that as of December 31, 2014,
24 that Ashley River Properties II worth approximately \$14.6
25 million.

1 In addition, the trustee said, I need to know what
2 I have here, I need to know what the value is. And we said,
3 well, we just had an appraisal done two months ago, and we
4 said --

5 THE COURT: That's the \$7.9 million appraisal.

6 MR. PITTA: The \$7.9 million. In addition we told
7 him just last year we had professional brokers market this
8 thing, and the bids came in between 6 and 9 million with one
9 \$12 outlier that apparently nobody thought was credible, but
10 even so, it was \$12 million, it still wasn't enough.

11 In addition we showed him the history of
12 appraisals of this property. And Mr. Longman and his
13 counsel continue to point to an eight year old appraisal
14 before the world fell apart, that said this thing was worth
15 20 something million dollars.

16 Prior to the \$7.9 million appraisal that we
17 received in January or February of this year, there were
18 three intermediary appraisals, all of which took place after
19 the market collapsed in 2009.

20 Those appraisals, which are in the record, Your
21 Honor, show the value decreasing each time the property was
22 appraised. And in no instance, did the maximum value found
23 under any of those appraisals in no instance would that
24 value inure to the benefit of the Emerald estate.

25 Every bit of evidence, save for one eight year old

1 appraisal that's been contradicted four times by appraisals
2 and two times by marketing processes, says that this
3 property simply is not worth what everybody once hoped it
4 would be. It's worth about \$8 million.

5 THE COURT: Is it underwater today? I mean, what
6 happened in the recent floods?

7 MR. PITTA: It's actually fine, Your Honor. They
8 apparently lost one tree, so they were quite lucky.

9 So we presented all of this to the trustee, and he
10 said, okay, but what do I have, what evidence do I have.
11 And we agreed, which we didn't have to do, we could've just
12 come back before you and said, you know what, Judge, we want
13 relief from the stay now, or we want to dismiss the case now
14 and have a trustee, we didn't.

15 THE COURT: Now, really I denied the motion to
16 dismiss without prejudice.

17 MR. PITTA: Yes, and we could have come back and
18 we didn't. Instead what we did was say, you know what,
19 let's reach a commercial and reasonable deal. Let's give
20 this trustee an opportunity to figure out if we're right, or
21 Mr. Longman is right, we'll give you the keys, we'll let you
22 hire the brokers, and you go figure out what the value of
23 that property is.

24 And if it comes back that there's value to this
25 estate, you can have it. We will sell the property. But if

1 it comes back that this estate has no existing equity in the
2 debtor in in Ashley River Property II well then let's
3 finally bring this all to a conclusion.

4 We've got ten years or more of litigation between
5 these parties. Litigation that the South Carolina Supreme
6 Court described as a pattern of abusive litigation by Mr.
7 Longman. Well, the trustee came in, and say, okay, that
8 makes sense, let's bring this to an end, I don't continue to
9 the charade that's gone on for a long time here.

10 Let's figure out what the value is, and if there's
11 value, I get it, and if there's not, then we'll turn over
12 the shares in accordance with the absolute priority rule.
13 The secured creditor gets its property.

14 The trustee retained Colliers, as a result of the
15 discussions and the objections that were raised to the bid
16 procedures motion, we extended the bidding period. We ran a
17 full process, Mr. Gazes' declaration details the work, that
18 Colliers did at his insistence. The extensive marketing
19 where this property was put in front of thousands of
20 potential investors, untargeted lists that Colliers retains,
21 as well as just more general public advertising.

22 And the result of that work was to confirm what my
23 client unfortunately already knew, is that this property
24 simply doesn't have the value that people hoped it once did.

25 And so here we are, and we have what's an

1 unfortunate conclusion to this case, nobody likes to see a
2 case where unsecured creditors are getting nothing, and the
3 trustee's just turning over property.

4 But anything else, any other result would simply
5 be permitting Mr. Longman and Shulte, his former counsel,
6 who were the parties that engaged in the ten years of
7 litigation, or Shulte for a portion of it, to extract some
8 value on account of value that doesn't exist at their claim
9 level.

10 Mr. Longman has equity in Emerald Investments LLC,
11 that's all he has. He's not even a creditor, so he sits
12 behind about \$3 million of unpaid legal fees, Emerald
13 Investments, all of which was used to litigate against my
14 client. So he's clearly out of the money.

15 But we also know that the lawyers who got
16 themselves into an unfortunate position with an unfortunate
17 client are also out of the money here.

18 Shulte does have a judgment against Mr. Longman,
19 and they can go chase him down. I wish them good luck. But
20 there's no value to this estate.

21 And I think that based on the evidence that's
22 before the Court, there's significant facts to back that up.
23 The Gazes' declaration details the efforts that were
24 conducted to ascertain that value. And the Williams'
25 declaration, particularly the bid procedures one, details

1 the debts that burden Emerald's equity in Ashley River
2 Properties II.

3 Your Honor I think accurately got the point about
4 disassociation, which is that somehow Mr. Longman believes
5 that by disassociating himself from Ashley River Properties
6 II, his equity somehow leapfrogs the debt and he should be
7 paid a portion of I guess what you would call the enterprise
8 value of --

9 THE COURT: Oh, I suppose a question is, did the
10 trustee exercise appropriate business judgment in deciding
11 to withdraw the notice of disassociation, proceed to
12 negotiate with Kriti, and reach an agreement as to the
13 marketing of the real property as opposed to just membership
14 interest. And it seems to me that that's an issue that I
15 need to decide if the trustee acted in good faith with
16 knowledge of -- after reasonable inquiry, with knowledge of
17 the facts and circumstances, and his legal evaluation, did
18 he exercise appropriate business judgment in withdrawing the
19 notice of disassociation, because he's testified that's what
20 he did.

21 If that's the case, it seems to me that the whole
22 brouhaha of whether -- you have to go down the road of
23 figuring out what happens with disassociation, whether you
24 recover back voting rights, or not recovering voting rights,
25 whether the -- Emerald's voting or non-voting equity

1 interest had any value to the estate, because he's the
2 trustee for the estate, that seems to me to be the issue
3 that I need to focus on. Do you agree or disagree with
4 that?

5 MR. PITTA: I agree in part, Your Honor, that's a
6 preliminary agreement. I think that even if you were to
7 find that the trustee didn't do everything he should have to
8 investigate disassociation, the operating agreement is in
9 evidence, it's before Your Honor. And as a simply legal
10 matter, there's no basis for finding what Mr. Longman would
11 have, you believe here.

12 Which is that by disassociating from this LLC and
13 his 70 percent equity ownership in this LLC, he would be
14 somehow be able to leapfrog the creditors of the LLC, and --

15 THE COURT: Your position is that Kriti's
16 affiliates are entitled to be repaid their debt and the
17 arbitration determined it was debt not recharacterized as
18 equity.

19 MR. PITTA: That's not my position, that's the
20 arbitrator's.

21 THE COURT: That was the arbitrator's, and that's
22 -- you know, that's a final judgment. It was confirmed, the
23 arbitration award was confirmed to determine that those were
24 valid debts, and your position is those debts had to be
25 repaid before equity interests received anything.

1 MR. PITTA: I think that's simple black letter
2 law, Your Honor.

3 Mr. Wolnerman argued, pointing to Section 11.3(b)
4 of the operating agreement, the disassociation section, but
5 you can't discount the membership interest and he pointed to
6 a provision here that says, "no discounts for minority
7 interests, lack of marketable, or other similar type
8 discounts."

9 THE COURT: He gets a hundred percent of nothing.

10 MR. PITTA: Correct. The amount of debt that sits
11 on the company's balance sheet is not --

12 THE COURT: A hundred percent of the 70 percent of
13 nothing.

14 MR. PITTA: Right. The amount of debt that sits
15 on a company's balance sheet ahead of equity is not a
16 similar type discount to marketability or voting rights of
17 those equity interests.

18 In addition to that, the disassociation provision
19 in 11.3(b) of the operating agreement sets a purchase price
20 upon disassociation. And what it says, is that the purchase
21 price shall be the appraised value, as defined herein, of
22 the "membership share."

23 Now, the membership share is defined as all the
24 other rights of a member under this agreement and under the
25 Act, including but not limited to a member's financial

1 rights and voting rights.

2 The arbitration decision specifically stripped Mr.
3 Longman of the voting rights. So all that's left in the
4 membership share is the member's financial rights.

5 THE COURT: And Mr. Gaze as the Chapter 11 trustee
6 controls those.

7 MR. PITTA: Correct. But so what the
8 disassociation says is that a membership share is what's in
9 play upon a disassociation. Mr. Longman and his counsel
10 point to a distinction between voting rights and voting
11 membership shares. And I think they have it backwards.

12 Voting membership shares is within voting rights.
13 If you look at the definition of voting rights, each
14 member's voting rights shall be a percentage expressed as a
15 fraction, a numerator of which is such member's voting
16 membership shares, and the denominator of which is the total
17 voting membership shares owned by all the members.

18 So voting membership shares is a piece of voting
19 rights which was taken by the arbitrators as confirmed by
20 the judgment in the New York Supreme Court. If what the
21 disassociation provisions do is to put the membership share
22 in play, it doesn't say I believe anywhere in Section 11.3,
23 anything about the voting membership share. It talks about
24 the membership share. And the membership share consists of
25 among other things voting rights.

1 So if the membership share and thus the voting
2 rights of the member are in play in this case, this member
3 has no voting rights. They've been taken away. And so all
4 that can be transferred upon a disassociation, to whomever
5 it goes, are the financial rights of the member.

6 Your Honor, I think in terms of the objection of
7 the disclosure statement, we address it in our brief.
8 What's required is -- well, I'll take a step back and say,
9 that the Bankruptcy Code says you can't solicit votes
10 without an appropriate disclosure statement.

11 Here as to the dissenting classes are technically
12 deemed to reject this plan at this point, I'm not sure that
13 that's all that relevant. But beyond that, what the cases
14 say is that it's -- what you need to have in there is
15 information that would be helpful. And here, I don't think
16 Mr. Longman could complain that he didn't have enough
17 information in the disclosure statement to determine what to
18 do.

19 This isn't a case where we have thousands of
20 creditors, and you've got somebody coming and saying,
21 there's a lot of people out there that don't necessarily
22 know what they're doing here. This is a case that literally
23 has four parties in interest, three of whom have actually
24 been active plus the trustee. You have my clients, Mr.
25 Longman, Shulte Roth and Young Garren (ph) as the trustee

1 for Thalen Reed (ph) who has not participated in the case at
2 all.

3 THE COURT: He's the trustee for who?

4 MR. PITTA: Thalen?

5 THE COURT: Yes.

6 MR. PITTA: All of the parties who voted on this
7 plan are (indiscernible) on this plan, have been actively
8 involved in this case. They know the issues, they've all
9 been previously argued and briefed. I don't think that the
10 lack of an inclusion clearly vis a vis Mr. Longman, the lack
11 of inclusion of the disassociation provisions was not a
12 factor in his vote because he briefed the issue in his
13 objection, so.

14 THE COURT: Well, look, the reality is that from
15 day one of this case, Mr. Longman has done everything he can
16 possibly do to derail this case, to delay it, that was
17 certainly central to my decision ordering the appointment of
18 a Chapter 11 trustee. It's revisited again in the opinion
19 granting the motion to approve the bidding procedures. So
20 there's been no -- I guess -- well, there's been no doubt
21 from the start, from day one, what Mr. Longman and he is the
22 sole trustee of the Gayla Longman Irrevocable Trust, what
23 his objectives in this case have been from day one. And
24 he's acted consistently with that throughout.

25 I think I have your arguments, Mr. Pitta.

1 MR. PITTA: Yes, Your Honor.

2 THE COURT: Mr. Gazes, do you want to be heard
3 very quickly?

4 MR. GAZES: Yes, Your Honor. I just wanted to add
5 with a little bit of clarification with regard to the
6 exercise of this appropriate business judgment. At that
7 point in time in reviewing that would be my determination
8 whether to reinstate the notice of disassociation or
9 otherwise just not --

10 THE COURT: You withdrew it without prejudice.

11 MR. GAZES: That's right.

12 THE COURT: You -- my understanding of your
13 testimony, you considered what the best course of action
14 would be to maximize the value of the estate.

15 MR. GAZES: That's correct.

16 THE COURT: Rather than seeking to reinstate it,
17 you negotiated.

18 MR. GAZES: That's correct. And probably so, I
19 began my negotiations with Mr. Longman and then Kriti. So
20 that's where my negotiations began.

21 THE COURT: Thank you.

22 MR. GAZES: Thank you.

23 THE COURT: All right. Counsel.

24 MR. WOLNERMAN: Thank you, Your Honor. I'd like
25 to start with just what I perceive as maybe a fundamental

1 confusion. I've heard this notion of leapfrog now a couple
2 of times, and I frankly don't understand what that means.

3 The intent of the disassociation provision, which
4 is -- that's what was Longman's intention from day one, as
5 he made clear, and I made clear on the record from day one.

6 THE COURT: Well, he didn't make clear. I --

7 MR. WOLNERMAN: You asked me, and I --

8 THE COURT: Oh, I did, because you didn't raise
9 it, I raised it with you on day one, it was clear to me what
10 your gambit was in filing the Chapter 11 case. I raised it,
11 you acknowledged that was correct.

12 MR. WOLNERMAN: Yes. So from day one, we've had
13 that decision. The leapfrogging is a fundamental confusion.

14 THE COURT: Let me ask you this, is there
15 something in any of the documents that prevented the Chapter
16 11 trustee from withdrawing the notice of disassociation?

17 MR. WOLNERMAN: You mean the documents?

18 THE COURT: Yeah. The uncontradicted testimony is
19 -- stop, let me ask my question. The uncontradicted
20 testimony, uncontroverted testimony is that the Chapter 11
21 trustee shortly after his appointment withdrew without
22 prejudice the notice of disassociation. And my question to
23 you is, is there anything that you can point to that
24 prevented the Chapter 11 trustee from doing what he did?

25 MR. WOLNERMAN: Only his fiduciary obligations,

1 Your Honor.

2 THE COURT: Okay. So if he --

3 MR. WOLNERMAN: As the estate representative.

4 THE COURT: Okay. And you agree that if he acted
5 consistently with his fiduciary duty as trustee, he had the
6 authority to withdraw the notice of disassociation, correct?

7 MR. WOLNERMAN: Correct.

8 THE COURT: Okay.

9 MR. WOLNERMAN: Back to my leapfrog argument, what
10 we've been trying to accomplish is not to give equity
11 something in -- before unsecured creditors, it's not to give
12 equity or Longman anything before anybody else. What we
13 tried to accomplish was to have the estate realize value, is
14 that its voting rights could be returned to the estate,
15 which continues to be our position that contractually that's
16 what the operating agreement says.

17 That if value could be returned to the estate, now
18 you have an asset that can be sold. You don't have an
19 asset, that is a 70 percent non-voting, you know, \$1 or \$10
20 asset. You now have a 70 percent controlling voting
21 interest in what is -- let's call it \$8 million, not that
22 the estate made its own appraisal of that.

23 THE COURT: It's your position that payment of
24 legitimate debts of ARC River II don't come ahead of the
25 membership interests receiving anything?

1 MR. WOLNERMAN: Correct, that is exactly what the
2 operating agreement says.

3 THE COURT: That's nonsense. No, it does not say
4 that. That's absolute nonsense. Your position is that your
5 client should have received \$5.6 million for an absolutely
6 worthless membership interest, the agreement doesn't say
7 that, you haven't pointed to language in it that says it.
8 It's a ridiculous position.

9 MR. WOLNERMAN: Your Honor, again, I'm not arguing
10 that my client should get anything pursuant to the
11 disassociation provision. That is the fundamental confusion
12 that I'm trying to address. It's that the estate should get
13 its 70 percent voting interest. And whether or not -- what
14 is it worth, it's worth \$8 million. And pursuant to the
15 operating agreement --

16 THE COURT: Not if there's 14 and a half million
17 dollars of debt ahead of it.

18 MR. WOLNERMAN: But that's not --

19 THE COURT: If the -- look, all right, make your -
20 -

21 MR. WOLNERMAN: That's the deal they struck.

22 THE COURT: Well, you're wrong, but go ahead,
23 that's your position, I understand your position, it's flat
24 out inconsistent with the documents, it's flat out
25 inconsistent with any view of economic reality. It's not

1 what the agreement says, I understand your argument.

2 MR. WOLNERMAN: Your Honor, the arbitrators were
3 very well aware of the operating agreement and the terms
4 that were used. It used the term membership share as a
5 thing that was preserved, and voting rights as a thing that
6 was lost. Voting membership share was never lost.

7 THE COURT: Okay. Make your next point.

8 MR. WOLNERMAN: On the impairment issue, on the
9 eve of bankruptcy, Kriti was ready to foreclose on this
10 property, the plan provides them exactly that belief. Where
11 they were on the day before filing, that is where they find
12 themselves today.

13 THE COURT: No, it isn't. Because they exercised
14 an 1111(b) option and their entire debt, whatever the value
15 is treated as secured, it's not bifurcated, and the evidence
16 -- the uncontroverted evidence establishes that the value of
17 the property was worth substantially less than the amount of
18 their secured claim, and they've agreed to pay
19 administrative expenses and applying Judge Glaser's Lorraine
20 decision, his analysis would apply here, because there's no
21 remaining question as to what the value of the underlying
22 property is. Go ahead.

23 (Pause)

24 MR. WOLNERMAN: Your Honor, just I think all the
25 points were made, just to conclude. One thing that we've

1 said early on is that the two major players in this case is
2 Kriti on the one side and Longman on the other side.

3 I understand that my client has a --

4 THE COURT: Shulte Roth would feel otherwise,
5 because your client owes them a lot of money.

6 MR. WOLNERMAN: I do. I think Shulte Roth
7 unfortunately has been caught in the middle.

8 THE COURT: They haven't been caught in the
9 middle, they -- anyway that's -- they're the largest
10 unsecured creditor.

11 MR. WOLNERMAN: Notwithstanding Longman's arguably
12 colorful past, and you know, again nothing -- what he's been
13 accused of in this case happened almost a decade ago, you
14 know, we decided not to appeal the trustee's appointment.
15 We -- frankly we thought it was unwarranted, but
16 nevertheless, to have a third party in here and to
17 independently deal with the situation was something that I
18 frankly welcomed.

19 And what --

20 THE COURT: It didn't seem that way at the time,
21 but.

22 MR. WOLNERMAN: What we have is a man with a
23 colorful past whose interest is perfectly aligned with the
24 estate, because he does not seek one penny until everybody
25 else gets paid in full.

1 THE COURT: If he had been right when he said in
2 the declaration that the property was worth \$30 million, and
3 it was exposed to the market with an adequate marketing
4 process, if \$30 million had been achieved, Mr. Longman would
5 have gotten a recovery. It didn't happen.

6 MR. WOLNERMAN: No, Your Honor, because instead
7 what happened was that one party who has an interest in
8 making sure that nobody gets anything, that was the party
9 that was empowered. There was some conversation about Kriti
10 handing over the keys to the trustee. The way that we see
11 things is that the trustee handed over the keys to Kriti.

12 THE COURT: You know, the options I faced at the
13 beginning of the case was lifting the stay and allowing the
14 judicial foreclosure to go forward in South Carolina, it was
15 about to happen the day after you filed the Chapter 11
16 petitions that stopped it, and I have no question that the
17 opportunity to obtain greater value was achieved through the
18 marketing process, the bidding procedures, the -- in this
19 court than a sheriff conducting a sale on a courthouse steps
20 of the property in South Carolina, which you were one day
21 away from.

22 MR. WOLNERMAN: Your Honor, we stand here today in
23 exactly the same position, so I'm not sure -- it looks like
24 six of one-half dozen to me.

25 THE COURT: Because the market has shown that the

1 property wasn't worth \$18 million --

2 MR. WOLNERMAN: Correct.

3 THE COURT: -- or anywhere near, not even half of
4 it, and that's the amount that had to be achieved for any
5 recovery, the value of membership interests.

6 MR. WOLNERMAN: Your Honor, this was part of our
7 argument in the first place is that the bid procedures, the
8 process that was set up, in the first place, was a sham.

9 THE COURT: Okay. You lost on that already.

10 MR. WOLNERMAN: And we have notice of appeal.

11 THE COURT: I know. Well, you don't have a notice
12 of appeal, you withdrew the appeal.

13 MR. WOLNERMAN: We withdrew the appeal. We feel
14 that that was a sham transaction, this transaction was only
15 possible --

16 THE COURT: Tell me why it was a sham transaction?

17 MR. WOLNERMAN: Because you cannot sell a business
18 for \$18 million with \$18 million worth of debt, that is not
19 going to happen.

20 THE COURT: If it's worth \$30 million you sure
21 can, it would've been a sale free and clear, the property
22 would've been sold for 18 million. For 30 million, if your
23 client was right, the 18 million in debt would have gotten
24 paid off, equity interests would have recovered money, there
25 was no sham about it. What was the sham about it, tell me.

1 MR. WOLNERMAN: I just told you. That just proves
2 that point.

3 THE COURT: You did?

4 MR. WOLNERMAN: It proves the point that if
5 there's \$18 million worth of debt then no one's going to pay
6 \$18 million for it. That is the sham.

7 THE COURT: Is that right? If the property was
8 worth 30 million, nobody would pay it?

9 MR. WOLNERMAN: They said it's worth 8 million and
10 they sold -- they put it up for sale for 18 million. My
11 client is not the fiduciary here.

12 THE COURT: Your client filed an affidavit in this
13 court stating that the value of the property was \$30
14 million, and they said, okay, we don't think so, the most
15 recent appraisal that Kriti got was \$7.9 million, your
16 client said it's 30 million, let's expose it to the market,
17 go through the marketing process, following the usual
18 bidding procedures, that's what was approved in two non-
19 qualifying bids, the highest of which was 8 and a half
20 million dollars with many conditions, et cetera, no deposit,
21 okay, demonstrated that it wasn't worth the debt.

22 And you call that a sham --

23 MR. WOLNERMAN: Your Honor --

24 THE COURT: -- you can characterize anyway you
25 want, that's just not reality.

1 MR. WOLNERMAN: If I may. In our bid procedures
2 objection, we laid out exactly what we thought was a sham,
3 it was just not --

4 THE COURT: Let's not reargue the bidding
5 procedures, just argue confirmation.

6 MR. WOLNERMAN: The confirmation process and the
7 bid procedure process go hand in hand, Your Honor. If you
8 don't allow parties to do due diligence, then they're going
9 to have conditions of their sale that they want to do due
10 diligence.

11 THE COURT: There was nothing in the bidding
12 procedures that prevented a party from doing due diligence.

13 MR. WOLNERMAN: Sure there is, Your Honor.

14 THE COURT: Okay. We're not going to argue about
15 due diligence -- about the bidding procedures. You reserved
16 -- you preserved your right on appeal in that, you dismissed
17 the appeal because it was an interlocutory order. You'll --
18 you know, you'll get your chance in some other court if you,
19 you know, preserve your rights, go ahead. I don't want to
20 hear bidding -- I ruled on the bidding procedures previous,
21 I wrote an opinion. I approved the bidding procedures, the
22 process went forward, it didn't result in a sale.

23 MR. WOLNERMAN: At the end, there is no indication
24 of what the debtor's 70 percent in ARC II is. There's been
25 no valuation, there's been a sale for \$18 million, there's

1 been no separate valuation. We take the position that Kriti
2 is not impaired, the fact that they decided to pay admin
3 claims basically to pay the trustee to hand over the keys,
4 to give them exactly what they would have gotten in the
5 foreclosure process, that's -- that is artificial
6 impairment.

7 THE COURT: Next argument.

8 MR. WOLNERMAN: Their claim should be -- okay,
9 thank you, Your Honor.

10 THE COURT: Do you have anything else you want to
11 say, go ahead?

12 MR. WOLNERMAN: No, that's it, Your Honor.

13 THE COURT: Ms. Park.

14 MS. PARK: Thank you for hearing from me, Your
15 Honor, Karen Park for the record, Shulte Roth & Zabel.

16 We -- I appreciate you hearing from me because we
17 do know that our joinder was untimely filed as Your Honor
18 pointed out. We decided to file after reviewing the
19 confirmation brief, we just filed on a couple days after the
20 objection deadline.

21 And we rise -- I rise, you know, after all this
22 talk about the value and the process, in a bankruptcy court
23 to raise actual bankruptcy law, but we do believe that the
24 proponents have an issue with impairments. And I know
25 you've heard from Mr. --

1 THE COURT: You relied on Lorraine Street
2 Associates case.

3 MS. PARK: That's right.

4 THE COURT: And that's the only authority that you
5 point to on the issue of whether Kriti, et al are impaired,
6 correct?

7 MS. PARK: That's correct.

8 THE COURT: Okay.

9 MS. PARK: I'm joining in --

10 THE COURT: And because they exercised their
11 1111(b) option, the election, the entire amount they're owed
12 is treated as secured, correct?

13 MS. PARK: Yes.

14 THE COURT: And I think they acknowledge that but
15 for the agreement to pay all administrative expenses, they
16 wouldn't be impaired. If that's what makes them impaired,
17 was the agreement exercised -- you know, agreed to quite a
18 while ago that they would fund all administrative expenses
19 in the case.

20 MS. PARK: That is correct, as a matter of fact.

21 THE COURT: So the issue of law is whether Kriti,
22 et al are impaired, that class, Class 1 is impaired based on
23 the amount that they're going to pay for administrative
24 expenses.

25 MS. PARK: I think that's right.

1 THE COURT: And Lorraine is the only case you cite
2 to in support of your argument that Class 1 is not impaired.

3 MS. PARK: In fact, it's also the only case that
4 Kriti cites to, to support its argument, the funding of the
5 admin expenses creates an impairment. And that's why I
6 rise, just to point out that in that case, the corollary
7 that the \$5,000 payment was coming directly out of the sale
8 proceeds in that case. This is a voluntary payment backed
9 by agreement, as everyone has acknowledged, Kriti has funded
10 to pay for this process.

11 And so what we would say is --

12 THE COURT: If they hadn't agreed to pay for the
13 process, you acknowledged at an earlier hearing that unless
14 the real property was sold for 18 million unsecured
15 creditors would not recover anything, you being the largest
16 of them.

17 MS. PARK: That was our understanding, yes.

18 THE COURT: So by their -- there wouldn't have
19 been any money to go through this process if they hadn't
20 agreed to pay the administrative expenses. There was no
21 money in the estate, do you agree?

22 MS. PARK: I think that's probably right, and as a
23 factual matter.

24 THE COURT: So unlike the \$5,000 that was involved
25 in Lorraine Street Associates, Mr. Gazes' testimony the

1 number is somewhere around 80,000 so far, obviously that has
2 to be allowed by the Court, but this is not a de minimus
3 amount and Judge Glasser didn't seem, you know, he says, at
4 198 B.R. F30, "however unlikely it may have been the Class
5 2's claim would have been satisfied through sale of the
6 premises. Such a determination could not have been made
7 until the value of the premises was established. Since an
8 event could -- since such an event could only occur after
9 confirmation of a plan, this Court cannot say as a matter of
10 law, Class 2 was impaired under the plan. Moreover, the
11 degree to which Class 2 would have been impaired was
12 minimal."

13 That's the \$5,000 and then he talks about
14 artificial impairment. So we're not talking about the de
15 minimus amount, the \$5,000 that was involved in Lorraine,
16 and because pursuant to the bidding procedures, the
17 marketing process took place here, we don't have the
18 uncertainty of knowing whether there was enough value in the
19 property. Do you agree with that?

20 MS. PARK: We don't take issue with the valuation
21 or the process quite frankly.

22 THE COURT: All right.

23 MS. PARK: But our issue is, it's more a legal
24 point that they have not met the 1129(a)(10) standard. In
25 this case, the 5,000 was on a few hundred thousand dollars

1 of debt. Here, we have a claim of 1.8 million -- 80 million
2 -- excuse me, 80,000 whether that's de minimus over that
3 amount, I mean, that's maybe a finding that, you know,
4 somebody could do.

5 But what we would say is, the judge -- Judge
6 Glasser does go on to say that courts have disfavored, have
7 looked upon with disfavor artificial impairment of claims,
8 and we think Mr. Gazes has, you know, has testified that he
9 doesn't think that the 80,000 or whatever the number ends up
10 being is on account of the secured claim and constitutes
11 impairment.

12 So one would argue that --

13 THE COURT: He didn't say that. No, no, you added
14 something. That wasn't his testimony. But --

15 MS. PARK: Fair enough, fair enough. He -- the
16 question I asked whether it was --

17 THE COURT: You asked --

18 MS. PARK: -- (indiscernible) secured claim. And
19 he said no. And we would -- and so we would say that
20 doesn't constitute an impairment. To the extent it does,
21 it's artificial impairment --

22 THE COURT: All right.

23 MS. PARK: -- that (indiscernible). The one last
24 thing I would just point out for the record is, to the
25 extent our firm participated in the history of dealings and

1 the arbitration, it was as counsel to the participants, we
2 did not ourselves participate. I just wanted to make that
3 clear.

4 THE COURT: Oh, I understand. You had the
5 misfortune of representing the unsuccessful party in the
6 arbitration.

7 MS. PARK: Correct.

8 THE COURT: Okay. I fully understand that.

9 MS. PARK: Thank you, Your Honor.

10 THE COURT: I don't want to hear any reply. I'm
11 going to take it under submission, and I'll issue an opinion
12 or an order in due course.

13 Thank you very much.

14 (Proceedings were concluded at 12:18 p.m.)

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CERTIFICATE

I, Sheila G. Orms, certify that the foregoing is a true and accurate transcript from the official electronic sound recording.

Sheila Orms

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